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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1288

LIBERTY MUTUAL INSURANCE COMPANY,
a corporation,
Petitioner,

vs.

SANDRA WETZEL, and MARI ROSS, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where, in this action brought as a class action for declaratory, injunctive and monetary relief under Title VII of the Civil Rights Act of 1964, the Petitioner objected to maintenance of the action as a class action under either F.R.C.P. 23(b)(2) or 23(b)(3) and resisted discretionary notice to class members prior to the entry of judgment against it, does the Petitioner, who no longer is challenging the court's finding of classwide discrimination, have a post-judgment right to circumvent that finding by asserting that class members were deprived of pre-judgment notice of the pendency of the class action, and was the District Court, having determined that the action should be maintained under Rule 23(b)(2), required to redetermine, *sua sponte*, that the suit should be maintained under (b)(3) after it concluded on a motion for summary judgment that changed conditions made injunctive relief no longer appropriate as to one of Respondents' claims?

COUNTERSTATEMENT OF THE CASE

Respondents commenced this action as a class action on behalf of Petitioner's female employees pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*, to obtain injunctive, declaratory and monetary relief due to Petitioner's sex discrimination. The statistical, documentary and testimonial evidence of discrimination was so overwhelming that the trial court granted Respondents' motion for summary judgment on the issue of liability. The finding of liability was affirmed by the Court of Appeals and is no longer being challenged directly. Instead, Petitioner is attacking the finding collaterally by challenging the trial court's management of the class action.

Following comprehensive discovery concerning Petitioner's employment practices, the District Court determined by order that the challenges to the company's hiring, promotion, salary and pregnancy-related employment practices may be maintained as a class action under Rule 23(b)(2). From the inception of the action until after the entry of judgment, Petitioner vigorously contested the propriety of maintaining the action as a class action under either Rule 23(b)(2) or 23(b)(3), and resisted Respondents' efforts to provide absent class members with discretionary notice of the pendency of the action. In its opinion granting summary judgment with respect to Petitioner's hiring and promotion practices and its pregnancy-related employment policies, the trial court concluded that injunctive relief was appropriate with respect to the continuing aspects of the pregnancy-related policies, but that such relief had become inappropriate with respect to the unlawful hiring and promotion practices which were found to have been

terminated after the commencement of Respondents' charges of discrimination.[1]

In the face of its previous assertions that manageability problems rendered this action unsuitable for class action treatment pursuant to Rule 23(b)(3), Petitioner argued on appeal that the trial court erred in affording the action (b)(2) rather than (b)(3) treatment and that the failure to provide notice of the pendency of the action was fatal.[2] The Court of Appeals held that the District Court, having determined that the Title VII suit brought in good faith for injunctive relief may be maintained under (b)(2), was not required to redetermine that the suit be maintained under (b)(3) and to comply with that provision's procedural requirements after it concluded on a motion for summary judgment that changed conditions made injunctive relief no longer appropriate as to some of Respondents' claims, and that due process was not denied in this case.[3]

In essence, Petitioner is seeking to assert the alleged rights of its employee-adversaries in a belated effort to escape liability to those employees.

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[1] Final judgment was entered with respect to each claim pursuant to Rule 54 (b) although no relief has been granted with respect to either claim. Separate appeals followed. The findings of discrimination were affirmed in each appeal and separate Petitions for Writs of Certiorari followed. The company's Petition relative to certain of its pregnancy-related employment policies is pending at No. 74-1245. The claim of discrimination in compensation was tried and is pending before the trial court.

[2] A member of the panel of the Court of Appeals before which the appeal was argued inquired of Petitioner's counsel at oral argument whether the company had ever requested that notice be given. Counsel responded that he did not recall. In fact, no such request was made.

[3] The Court of Appeals noted the existence of a serious question concerning whether the Petitioner, during a colloquy with Judge Aldisert, abandoned its due process contention at oral argument. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir. 1975), 254, n.32. Although the Court of Appeals considered Petitioner's contention, it is Respondents' position that the contention was waived unequivocally. That position, however, must be asserted only if the Petition is granted.

ARGUMENT

NO BASIS EXISTS FOR, AND NO VALID PURPOSE COULD BE ACHIEVED BY, AFFORDING THE COMPANY ANOTHER OPPORTUNITY TO LITIGATE ITS NOW UNCONTESTED LIABILITY BY GRANTING ITS PETITION FOR WRIT OF CERTIORARI.

Although Respondents recognize the importance of issues concerning the binding effect of class actions and the propriety of maintaining Title VII actions which include ancillary claims for back pay under Rule 23(b)(2), this case is not an appropriate one in which to resolve such issues in the abstract.

The thrust of Petitioner's basic arguments is premised upon the alleged rights of class members to receive notice of the pendency of class actions under the express terms of Rule 23(b)(3) or by virtue of due process requirements. It acknowledges that it was Respondents' requests for notice which the District Court denied,[4] and makes no real argument that it, rather than class members, had any right to have notice disseminated. Rather, it argues abstractly that the absence of notice can prejudice a party opposing a class in those circumstances where that party prevails on the merits and dissatisfied class members seek to avoid the effect of the decision. No such situation exists here, however, and Petitioner cannot assert class members' rights. *Tileston v. Ullman*, 318 U.S. 44 (1943).

Contrary to Petitioner's assertion, no conflict exists among the decisions of the Courts of Appeals as to whether a class action *predominantly* for money damages may be maintained under Rule 23(b)(2) rather than 23(b)(3). The

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[4] Petition for Writ of Certiorari, p.13, n.21.

simple fact was, and is, that the instant action was never an action predominantly for money damages. It was, and is, as the trial and appellate courts found, an action for declaratory, injunctive and monetary relief. The predominant objective of the lawsuit was, and is, to stop all of the employer's unlawful hiring, promotion, compensation and pregnancy-related employment practices. As the Court of Appeals properly pointed out, "The (b)(2) nature of the class, while visible as to the promotion and hiring issues, becomes translucent when viewed in the light of the multifaceted attack upon Liberty Mutual's policies," 508 F.2d 239, 252, and it is "only with the benefit of hindsight" that we now know that injunctive relief against one of the challenged practices ultimately became unnecessary. *Id.*, 251.

Neither the trial nor the appellate court has intimated whether any monetary relief will be granted, and Petitioner has cited no factually analogous case in which any Court of Appeals has held that the action was "predominantly for money damages." Reliance upon the unusual fact situation in *Airline Stewards v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993-4 (1974), is misplaced. There, the District Court made no order concerning the maintenance of the actions as class actions until after a settlement had been proposed. The settlement was set aside because of a union's inadequate representation of an employee class and the clear existence of antagonistic interests among class members. Because that Court of Appeals concluded that a group of class members should be permitted to request exclusion from the class because of those antagonistic interests, it held that the action should proceed under Rule 23(b)(3) on remand. No such antagonism is asserted or exists in this case. A pre-judgment class determination was made in this case, and the Court of Appeals was presented with the narrow post-judgment issue

of ". . . whether a district court, having determined that a Title VII suit brought in good faith for injunctive relief may be maintained under (b)(2) is required to redetermine that the suit be maintained under (b)(3) and comply with its procedural requirements once it concludes on a motion for summary judgment that changed conditions make injunctive relief no longer appropriate." 508 F.2d 239, 250. It properly declined to so hold.

Petitioner's due process argument is more theoretical than real since no class member is seeking to avoid the effect of the judgment due to a lack of notice. Although Respondents acknowledge the importance of issues concerning the binding effects of class action judgments, constitutional issues must be resolved in real controversies between affected adversaries. If and when an absent class member in a proper case seeks to escape the binding effect of a judgment in a (b)(2) class action in which no prior notice was given, such a controversy will exist and it will be appropriate then to resolve the issue on the facts of that particular case. Here, however, only the party opposing the class, the same party which avoided notice in the trial court, is seeking to avoid the effect of the judgment. If Petitioner's argument is accepted, only one result can follow. Judgment will be vacated, notice will be given and three years of litigation will be repeated. Petitioner will be given another opportunity to litigate the issue of its liability, an issue which it has not raised in its Petition.

Petitioner asserts that the Second Circuit has held that notice is required as a mattter of due process in all class action suits. In support of its argument, it relies upon *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968), a (b)(3) action in which this Court expressly declined to answer the due process question now proferred by Petitioner. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The contention

concerning due process notice requirements imposed by the Fifth, Sixth and Seventh Circuits is untenable. Petitioner cites no analogous Title VII action in which either Court of Appeals reached the conclusion attributed to it. The failure to cite any such case is understandable in light of the following decisions of those courts: *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *Meadows v. Ford Motor Co.*, ___ F.2d ___, 9 FEP Cases 180, 9 EPD ¶ 9907 (6th Cir. 1975); *Thornton v. East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); 489 F.2d 896 (7th Cir. 1973); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 9916 (1971). The practice in those circuits is consistent with the procedure utilized by Judge Weber in the trial court in this case. Questions of classwide discrimination are resolved in (b)(2) actions prior to the dissemination of notice. Thereafter, if other than equitable relief is to be considered, notice is given.

Rule 23 necessarily grants broad discretion to trial courts in the day-to-day management of class action litigation. In the exercise of that discretion, the trial judge properly concluded, on the facts of the case before him, that notice was not required prior to a decision on Respondents' motion for summary judgment. No reason exists for disturbing that conclusion where the only possible result will be the relitigation of a now uncontested issue.[5]

[5] Questions of notice aside, Petitioner may be bound by the summary judgment determination in Respondents' individual actions by virtue of collateral estoppel. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Katz v. Carte Blanche Corporation*, 496 F.2d 747 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974). Granting the Petition inevitably will result in reviewing not only the questions presented by Petitioner, but also the potential collateral estoppel issues lurking in the background. The existence of those issues demonstrates further the wisdom of denying the Petition in the factual context of this case.

CONCLUSION

For all of the reasons stated above, Respondents respectfully submit that no issue is presented in this case which is worthy of the grant of certiorari by this Court. Thus, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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